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SEP 17 2004

No. 03-9560

IN THE

Supreme Court of the United States

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the state trial judge's refusal of lesser included offense instructions in a capital murder case on the ground they were unsupported by the evidence violate the United States Constitution under the rule of *Beck* v. *Alabama*?

2. Did petitioner properly raise Question 1 before the Mississippi Supreme Court, for the purposes of 28 U. S. C. § 1257, so as to give this Court jurisdiction to review it?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner in this case asks this Court to decide a federal question which he did not raise in the state court, based on his claim that the state-law issue he did raise there is "virtually identical." Not only would this expand this Court's jurisdiction

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

beyond the limit in place since 1789, but the same rule would probably be applied in habeas corpus, where it would undercut both the exhaustion rule and the deference standard. It would create an incentive to "sand bag" the state court, allowing prisoners to claim the state court "unreasonably applied" a precedent of this Court, even though that precedent was never cited to the state court. This evasion of AEDPA would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On May 15, 2000, Hugh Pernell was shot and killed in his car in New Albany, Mississippi. The crime occurred in front of the home of Charles Rice, who witnessed it from inside. See *Howell* v. *State*, 860 So. 2d 704, 712, 713 (Miss. 2003). Howell was identified as the shooter by Mr. Rice as well as by co-defendant Curtis Lipsey. *Id.*, at 736. Mr. Rice saw Howell get out of another car, walk up to Mr. Pernell's car, have a conversation, and then pull out a gun and shoot Mr. Pernell. Testimony by Lipsey and other associates of Howell's indicated that he planned a robbery for the purpose of getting money to pay his probation officer, to avoid being incarcerated. *Id.*, at 713-714. Lipsey further testified that when Howell returned from Mr. Pernell's car, he said Mr. Pernell had sprayed him with mace, so he shot him. *Id.*, at 714.

Howell was charged with capital murder based on killing in the course of a robbery. He requested instructions on simple murder and manslaughter. *Id.*, at 741. The prosecutor objected on the ground that there was no evidence to support the mental element of simple murder. "[T]here is no evidence of premeditation and deliberate design which is a necessary element of simple murder." J. A. 33. The trial judge denied the instruction. 860 So. 2d, at 743. Howell was convicted of capital murder and sentenced to death. *Id.*, at 712.

SUMMARY OF ARGUMENT

From the very beginning of the federal judiciary, this Court's appellate jurisdiction over state court judgments has been limited to cases where the federal question was presented to the state court. Although the Court's cases on the required specificity of the claim have varied, the time has come to require that a federal claim be expressly identified as federal. This requirement imposes no significant burden on competent lawyers, and remedies exist for litigants with incompetent lawyers.

The claim that state courts have addressed the federal question when state and federal rules are "virtually identical" is a mirage. Rules of constitutional law are not simply abstract statements of rules, but rather are made up of bodies of case law interpreting and applying those rules. For a court to decide a claim properly, it must be directed to the correct body of case law. Different bodies of precedent may yield different results, even when the abstract statements of "the rule" are the same.

The defendant did not make a federal claim to the Mississippi Supreme Court. Neither the cases he cited directly nor the authorities relied on by those cases refer to the Fourteenth Amendment or to the *Beck* v. *Alabama* line of cases. They were decided on the basis of state law, which is more generous to defendant than *Beck* and *Hopkins* v. *Reeves* require.

ARGUMENT

I. A litigant must unambiguously apprise the state court of the federal nature of the claim to preserve the issue for this Court's review.

"In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and *error is not to be predicated upon their failure to decide questions not presented.*" *McGoldrick* v. *Compagnie Generale*

Transatlantique, 309 U. S. 430, 435 (1940) (emphasis added). Petitioner asks this Court to reverse the judgment of the Mississippi Supreme Court on the ground that the trial judge's refusal to instruct on lesser degrees of homicide violates the Eighth and Fourteenth Amendments to the United States Constitution. Brief for Petitioner 9-10. The Mississippi Supreme Court did not decide that question erroneously. It did not decide that question at all. The question was never presented to it.

In cases where the validity of statutes are not questioned, Congress has limited this Court's jurisdiction to review state judgments to cases where a federal right "is specially set up or claimed." 28 U. S. C. § 1257(a). This language has been in the jurisdictional statute from the beginning. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-86. To hold that a federal question is preserved simply by claiming a congruent state-law right would, in effect, strike the word "specially" from the statute. Such an action would be as unwise as it would be illegitimate. "[T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts." *Webb* v. *Webb*, 451 U. S. 493, 499 (1981).

This rule is very similar to the fair presentation requirement under the habeas exhaustion rule of 28 U. S. C. § 2254(b), and it is based on similar policy considerations. See *Webb*, 451 U. S., at 500. Twice in recent habeas cases, this Court has been presented with arguments that the petitioner need not expressly identify the claim as federal, because the state and federal rules were "virtually identical." However, neither case resolved the question. In *Duncan* v. *Henry*, 513 U. S. 364, 366 (1995), the Court found that the rules were not "virtually identical," and in *Baldwin* v. *Reese*, 541 U. S. __, 124 S. Ct. 1347, 1352, 158 L. Ed. 2d 64, 72 (2004), the Court found that the argument had been waived.

Illinois v. *Gates*, 462 U. S. 213, 219 (1983) acknowledged that the Court's cases in this area have not been entirely consistent. The time has come, *amicus* submits, to lay down a clear,

simple, and easily complied-with rule: to preserve a federal claim for review in federal court, whether on certiorari or habeas, a party must unambiguously identify the claim as federal. "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts . . . ." *Webb*, 451 U. S., at 501 (emphasis in original). For example, applying this standard, a claim that a judgment "constitutes an excessive fine, and violates constitutional principles" does not state a federal claim under the Excessive Fines Clause of the Eighth Amendment when the state constitution has its own excessive fines clause. See *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 77-78 (1988). There is no need to ask if the two clauses are the same, and the *Bankers Life* Court did not.

A requirement to expressly state the federal basis of a claim presents no great burden to even a marginally competent lawyer. "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.' " *Reese*, 124 S. Ct., at 1351, 158 L. Ed. 2d, at 71.[2] In cases of grossly incompetent lawyers for criminal defendants, ineffective assistance claims provide relief from the rigors of procedural default rules. See *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).[3] Civil litigants have malpractice remedies.

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2. Although this is sufficient to put the state court on notice of the federal nature of the claim, a bare assertion without supporting argument and authorities would constitute a waiver of the claim in most jurisdictions. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Baldwin* v. *Reese*, No. 02-946, pp. 11-12 (available at http://www.cjlf.org/briefs/Reese.pdf).

3. Such claims are best addressed on collateral review, see *Massaro* v. *United States*, 538 U. S. 500, 504 (2003), and *amicus* CJLF takes no position on whether defendant has such a claim in the present case.

Various reasons have been advanced for requiring a federal claim to be presented to the state court first, some of which apply when the state-law claim is "virtually identical" and some of which do not. Ensuring an adequate record is one reason, see *Gates*, 462 U. S., at 221, but the record will typically not be impaired if an identical state-law claim has been fully litigated. On the other hand, the policy of enabling the state court to identify and act upon possible independent state grounds, see *id.*, at 222; *Webb*, 451 U. S., at 500-501, applies fully here. For example, if the state court has a rule that a federal claim must be made at trial to be considered on appeal, the federal claim must be expressly made on appeal to get a state-court ruling on the default question.

The primary reason for the rule, however, is that "[p]rinciples of comity in our federal system require that the state courts be afforded the opportunity to perform their duty . . . ." *Webb*, *supra*, at 499. The argument is made that when "there is no significant difference" between the state and federal rules, then "the state courts did have a fair opportunity to assess [the] federal claim." *Reese*, 124 S. Ct., at 1352, 158 L. Ed. 2d, at 73 (Stevens, J., dissenting). This argument reflects a simplistic view of the process of deciding cases. Rules of law created by judicial precedents are not simply the abstract standards stated in the opinions. Each generation of law students must be taught to carefully read the *facts* of the cases they study, not just skip ahead to "the rule." So, too, courts deciding constitutional questions must consider bodies of case law as precedents, not just apply disembodied abstract standards.

The "grossly disproportionate" punishment cases illustrate why a state court must be clearly informed whether it is being presented with a federal claim, a state claim, or both. Under this Court's precedents, a grossly disproportionate prison sentence violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. See *Lockyer* v. *Andrade*, 538 U. S. 63, 72 (2003). Under the precedents of the California Supreme Court, the same rule is included in the corresponding provision

of the California Constitution. See *People* v. *Dillon*, 34 Cal. 3d 441, 478, 668 P. 2d 697, 719 (1983). However, the task of a California Court of Appeal in deciding whether a given sentence for a given crime violates one provision is not the same as deciding whether the same sentence violates the other. Deciding the federal question requires a fact-intense comparison to other Eighth Amendment proportionality cases, particularly this Court's cases. See *Andrade*, *supra*, at 73-74. The state question, on the other hand, requires particular attention to California Supreme Court precedents, and if the defendant makes both arguments, the reviewing court must undertake both analyses. See, *e.g.*, *People* v. *Weddle*, 1 Cal. App. 4th 1190, 1193-1200, 2 Cal. Rptr. 2d 714, 715-720 (1991). The results are not necessarily the same. Compare *Harmelin* v. *Michigan*, 501 U. S. 957, 961, 994, 996 (1991) (life without parole for 672 grams of cocaine, first offense, affirmed), with *In re Foss*, 10 Cal. 3d 910, 915-917, 519 P. 2d 1073, 1075-1076 (1974) (10-year minimum for five counts of furnishing heroin with one prior, reversed).

The differences in the tasks presented become even greater in the state court of last resort. If the court of last resort of a jurisdiction finds the precedents of that jurisdiction unclear or conflicting, it can overrule them to the extent necessary to establish consistency. See, *e.g.*, *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994). Lower courts do not have that option. They must instead follow higher courts' precedents, to the extent their rules can be discerned. See *Agostini* v. *Felton*, 521 U. S. 203, 237 (1997). Unless a claim is identified as state or federal, a state high court does not know whether it is acting as a court of last resort with authority to overrule or modify conflicting or unwise precedents or whether it is acting as a court of subordinate jurisdiction, duty-bound to follow this Court's precedents whatever it may think of them.

The claim of "virtually identical" state and federal rules is a mirage. For many rules, the general standard is a skeleton, and the case-by-case application of the standard to real facts

puts the flesh on the bones. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698 (1984); *United States* v. *Banks*, 540 U. S. 31, 124 S. Ct. 521, 524-525, 157 L. Ed. 2d 343, 352 (2003); *Yarborough* v. *Alvarado*, 541 U. S. __, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 938, 951 (2004). Even if the respective statements of "the rule" are truly identical, each abstract statement of the rule refers to a different body of precedent under the ultimate control of a different court.

As important as the requirement of fair presentation is on direct review, it is even more important on habeas corpus after the Antiterrorism and Effective Death Penalty Act of 1996. The federal habeas court must examine whether the state court identified the pertinent Supreme Court precedents and applied them reasonably to the facts of the case. See *Lockyer* v. *Andrade*, 538 U. S., at 73-76. How can a federal court decide whether a state court unreasonably applied clearly established federal law, see 28 U. S. C. § 2254(d), when the state court was never told that a federal claim was being made?

Simple rules produce efficient litigation and clear results. Complex rules, riddled with exceptions, produce expense, delay, and doubt. When exceptions are necessary to prevent injustice, the price of litigating the exceptions must be paid. See, *e.g.*, *Carrier*, 477 U. S., at 496 (actual innocence exception to procedural default rule). No such necessity is presented here, and the price is high.

If a "virtually identical rule" exception is created, then this Court must determine whether the state and federal rules are actually close enough to qualify before the Court can be sure of its jurisdiction. See *Henry*, 513 U. S., at 366. This determination will require examination of two bodies of case law, not just comparison of abstract rules. The determination will have to be made each time, because bodies of case law that were once consistent may diverge in time.

On the other hand, the net yield from this exercise, in terms of preventing injustices that would otherwise go uncorrected,

is low. Federal habeas remains available despite default in cases of cause and prejudice, ineffective assistance, or actual innocence. See *Carrier*, 477 U. S., at 485, 488, 496. Further, by definition, the defendant has already received a hearing and decision on a "virtually identical" state rule. The only cases where the proposed exception would produce a better result are those where the state court decides the issue incorrectly to produce an unjust result, yet the defendant does not qualify for any of the gateways to habeas relief. The number of such cases is vanishingly small. If the federal violation is glaring and the state decision clearly wrong and unjust, then failure to raise the federal claim is ineffective assistance and prejudicial. If the federal question is close, then reversal of the judgment on certiorari or relief from it on habeas "is not proof that justice is thereby better done." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the result).

In this instance, the simple rule is the just rule. A party who wishes to preserve a federal claim in state court must identify it as such, either by citing the federal laws or Constitution or by citing a case (or point in a case) decided *solely* on federal grounds.

II. Defendant did not make a federal *Beck* claim in the Mississippi Supreme Court.

A. Due Process and State Law.

Beck v. *Alabama*, 447 U. S. 625 (1980) requires a lesser included offense instruction when the lesser offense is recognized as included under state law and when evidence supports such a verdict. See *Hopper* v. *Evans*, 456 U. S. 605, 609 (1982); *Hopkins* v. *Reeves*, 524 U. S. 88, 94-96 (1998). *Beck*

is essentially a due process case, see *Hopper*, *supra*, at 609, although it has Eighth Amendment overtones. See *id.*, at 611.[4]

Like most due process rules, the constitutional rule announced in *Beck* was already nonconstitutional law in most states in its general outline. See *Beck*, 447 U. S., at 635-637, and n. 12. This is not surprising, because the universality of a rule throughout the United States is a principal consideration in determining that the rule is an essential component of the process that is due. See *id.*, at 637; *In re Winship*, 397 U. S. 358, 361-362 (1970). Conversely, however desirable this Court may consider a rule to be, "long-standing and widespread use" of a contrary procedure is powerful evidence that the rule is not mandated by the Due Process Clause. See *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967); *Schad* v. *Arizona*, 501 U. S. 624, 640 (1991) (plurality opinion).

However, raising even a universally acknowledged rule to a federal constitutional mandate has an adverse side effect. It involves the federal courts in policing the details of rules that had previously been matters of state law. For example, although proof beyond a reasonable doubt in adult criminal trials was the universal rule long before *Winship*, 397 U. S., at 361-362, the constitutionalization of that rule required this Court to engage in detailed parsing of state jury instructions. See *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*); *Victor* v. *Nebraska*, 511 U. S. 1 (1994). The results have been dubious. See *Estelle* v. *McGuire*, 502 U. S. 62, 72-73, n. 4 (1991) (disapproving *Cage* in part); *Sullivan* v. *Louisiana*, 508 U. S. 275, 278, n.* (1993) (reserving question of whether identical instruction would now survive review under the revised standard).

A similar result follows from *Beck*. Although the broad outline of the rule was almost universal before *Beck*, the details

4. In *Beck* itself, the defendant argued both provisions, see 447 U. S., at 632, and the opinion does not say expressly which provision it is based on.

of its implementation were not. "[S]tates vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction . . . ." 447 U. S., at 636, n. 12. Petitioner now asks this Court to supervise the Mississippi courts on the very point that was not universal at the time of the *Beck* decision.

A strong argument can be made that the constitutional mandate found by *Beck* is limited to cases where the "quantum of proof" meets the most demanding standard from among those cited for the national consensus, see *ibid.*, and that anything more generous to the defendant is a matter of state law. For the present case, though, it is not necessary to decide that question. Indeed, if the Court has no jurisdiction, it is not proper to decide that question. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94 (1998). For the present case, it is only necessary to hold that before the Mississippi Supreme Court can be second-guessed on whether the defendant met the "quantum of proof" requirement of *Beck* and *Hopper*, it must be apprised that a federal question is at issue.

B. Beck and Felony Murder.

Beck v. *Alabama*, *Hopper* v. *Evans*, and *Hopkins* v. *Reeves* were all felony murder cases, as is the present case. The long-standing and widespread rule throughout most American jurisdictions is that the mental state for first-degree murder may be either premeditation *or* intent to commit certain felonies, including robbery. See *Schad*, 501 U. S., at 640-641. Second-degree murder typically requires intent to kill but not premeditation. It may also include killings in the course of felonies other than those listed for first-degree and so-called "depraved heart" murder. See 2 W. LaFave, Substantive Criminal Law § 14.7(e), p. 487 (2d ed. 2003); see also *id.*, § 14.4, at 436-444 (describing "depraved heart" murder).

Since one cannot premeditate without intending, intent-to-kill second-degree murder is necessarily included in premeditated first-degree murder. However, since it is quite possible to

commit first-degree felony murder without intending to kill, intent-to-kill second-degree murder is "included" only if the state chooses to define included offenses more broadly than strict logic demands. If the state chooses the strict route, so that instruction on intent-to-kill murder is improper as a matter of law when felony murder is charged, *Beck* does not stand in the way. *Hopkins*, 524 U. S., at 90-92; see also *Schmuck* v. *United States*, 489 U. S. 705, 715-716 (1989) (adopting strict "elements" test and rejecting "inherent relationship" test for federal criminal cases). On the other hand, a state may, if it wishes, provide instructions on a "lesser related offense," *i.e.*, an offense that has an element not included in the elements of the greater offense. See, *e.g.*, *People* v. *Geiger*, 35 Cal. 3d 510, 514, 674 P. 2d 1303, 1303 (1984) (adopting lesser related offense rule), overruled in *People* v. *Birks*, 19 Cal. 4th 108, 112-113, 960 P. 2d 1073, 1074-1075 (1998) (returning to elements test); see also *Hopkins*, *supra*, at 97.

In *Beck*, the defendant was tried for an offense that required proof of both intent to kill *and* killing in the course of a robbery. See 447 U. S., at 627-628. Felony murder was a lesser included offense under the strict elements test, see *id.*, at 628, and it was undisputed that the evidence was sufficient to warrant a lesser included offense instruction, *i.e.*, there was a basis for doubt on intent. See *id.*, at 630. *Hopper*, 456 U. S., at 607, was another Alabama case involving the same law, but no doubt whatever of intent, and therefore no basis for a lesser included offense instruction. See *id.*, at 613.

The present case differs from *Beck* and *Hopper* in that Mississippi capital murder includes felony murder as traditionally defined, with no *mens rea* beyond intent to commit the felony. See *Howell* v. *State*, 860 So. 2d 704, 738 (Miss. 2003); Miss. Code Ann. §97-3-19(2)(e). A completed felony is not required; attempt is sufficient. § 97-3-19(2)(e). Simple murder is defined with three alternative mental states: deliberate design, depraved heart, or felonies other than the capital felony murder felonies. § 97-3-19(1).

In the present case, Instruction S-1[5] gave the elements of capital murder as the killing of a human being, "unlawfully, illegally, and feloniously . . . with *or without* the deliberate design" to kill, during a robbery. See Appendix A (emphasis added). Instruction S-2 defined robbery in a way that includes attempted robbery. See *ibid.* Defendant's proposed instruction D-13 defined simple murder with the added element "in the commission of an act inherently dangerous to others and evidencing a depraved heart, regardless of human life . . . ." J. A. 17. It also proposed a negligent manslaughter instruction. See *ibid.* Defendant's proposed instruction D-18 requested a simple murder instruction with the added element "*with* the deliberate design" to kill, plus the negligent homicide instruction. J. A. 20 (emphasis added). Thus, each variant of homicide for which defendant requested an instruction had an element *not* included in the elements of capital murder.

In this Court, defendant claims the evidence supported the third variant of simple murder: commission of a felony not among those listed for capital murder, specifically selling drugs. Brief for Petitioner 9, n. 1. His Statement of the Case, *id.*, at 2-5, does not cite any evidence whatever that would have supported a conviction for that offense.

Simple murder in Mississippi is therefore what *Hopkins* and *Geiger* called a "lesser related offense" of capital murder when the capital murder charge rests on a felony murder theory, as in this case. This case differs from *Hopkins*, however, in that state law does permit instruction on this lesser related offense if supported by the evidence. *Howell*, 860 So. 2d, at 744.

As a general rule, Mississippi follows the same elements test as *Schmuck*. A lesser included offense is one whose elements are all included in the elements of the greater offense. See *State* v. *Shaw*, No. 2001-KA-01854-SCT ¶ 18 (Miss., Aug.

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5. Instructions S-1 and S-2 are reproduced in Appendix A to this brief. S-3 and S-6 are quoted in the state court opinion. 860 So. 2d, at 741. D-13 and D-19 are in the Joint Appendix.

12, 2004). A lesser offense with a different element, what *Hopkins* and *Geiger* called a "lesser related offense" is simply called a "lesser offense" in Mississippi. See *ibid.*

Homicide, however, is special. The degrees of homicide have never fit neatly into the elements model. "Malice aforethought" is supposedly the element that intent-to-kill murder has and voluntary manslaughter lacks, but the reality is that manslaughter is murder plus the mitigating anti-element of "heat of passion on sudden provocation." See *Mullaney* v. *Wilbur*, 421 U. S. 684, 693-694 (1975).

Mississippi treats manslaughter as a lesser included offense of murder notwithstanding the fact that it does not meet the strict elements test. See *Shaw*, *supra*, ¶¶26-27; *id.*, at ¶35 (Carlson, J., dissenting). In the typical case, this laxity in definition benefits the defendant, for the reasons stated in *Beck*, although there are some cases, such as *Shaw*, where the defendant *wants* the "all or nothing" instruction. See *id.*, at ¶38 (Carlson, J., dissenting). However, Mississippi law is symmetrical. Either party gets the instruction on request, if supported by the evidence, and the same is true for "simple" murder as a lesser included offense of capital murder. See *Harveston* v. *State*, 493 So. 2d 365, 374-375 (Miss. 1986). The special status of degrees of homicide as lesser included offenses was codified after the decision in the present case. See Miss. Code Ann. § 97-3-19(3); see also *Shaw*, *supra*, at ¶43 (Carlson, J., dissenting).

Under *Hopkins*, Mississippi is not required by federal law to instruct on simple murder as a lesser included offense of felony capital murder, but it chooses to do so when the instruction is supported by the evidence. Defendant, in essence, argues for a "no generous act goes unpunished" rule, cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 484 (1999), extending federal scrutiny to Mississippi in the same situation where Nebraska's strict rule precluded it in *Hopkins*. Whether *Beck* should be so extended is an important

question that has not yet been resolved and that was not presented to the Mississippi Supreme Court.

C. Defendant's State Brief.

With this background, we come to defendant's brief in the Mississippi Supreme Court. Issue XIV is the lesser included offense claim, argued on pages 101-102 of the brief, reprinted at J. A. 39-40.

Defendant's state brief cited and misquoted *Conner* v. *State*, 632 So. 2d 1239 (Miss. 1993), overruled on other grounds, *Weatherspoon* v. *State*, 732 So. 2d 158, 161 (Miss. 1999). Although no point page is given, the reference is clearly to part IV of *Conner*, on pages 1253-1255. No case outside Mississippi is cited in this part of *Conner*, and no federal law is mentioned. For its substantive holding, *Conner* relies primarily on *McGowan* v. *State*, 541 So. 2d 1027, 1028 (Miss. 1989), a noncapital case decided entirely on state law.

Defendant's brief also cited *Harveston* v. *State*, 493 So. 2d 365, 373 (Miss. 1986). *Harveston* was the reverse of the present situation, where the simple murder instructions were given over the defendant's objection, and he was convicted of the lesser offense. *Id.*, at 374. No federal claim was made or addressed. The case merely stands for the proposition that the instruction is proper under state law when supported by the evidence, unlike the Nebraska rule in *Hopkins*.

Finally, defendant distinguished *Edwards* v. *State*, 737 So. 2d 275, 311 (Miss. 1999). That case simply stated the rule of *Conner* and *McGowan* and found the instruction not warranted by the evidence. None of the three authorities cited directly by defendant discusses a federal question or a federal precedent on the pertinent point, nor does the *McGowan* case, which those cases rely on. Nothing in defendant's brief apprised the state court that a federal question was at issue.

When the elements of the charged offense are A, B, and C, and the elements of a lesser, uncharged offense are A, B, and D,

is the defendant entitled to an instruction on the lesser offense when the evidence of C is debatable but neither the prosecution nor the defense has introduced evidence of D? The Mississippi Supreme Court said no as a matter of state law, with no claim having been made under federal law. This Court has no jurisdiction to review that holding.

CONCLUSION

The writ of certiorari should be dismissed for lack of jurisdiction.

September, 2004

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT
OF UNION COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs. **Criminal Case No. UK2000-82**

MARLON LATODD HOWELL

JURY INSTRUCTION NUMBER S-1

The Court instructs the jury that the defendant, Marlon Latodd Howell, has been charged under the indictment with the crime of capital murder in the death of Hugh David Pernell.

If you find from the evidence in this case beyond a reasonable doubt that:

1) Hugh David Pernell was a living human being; and,

2) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell in Union County, Mississippi, on or about the 15th day of May, 2000; and

3) the defendant, Marlon Latodd Howell, acted unlawfully, willfully, and feloniously, without authority of law and with or without the deliberate design to effect the death of Hugh David Pernell; and,

4) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell at a time when the said Marlon Latodd Howell was engaged in the commission of the crime of robbery of the said Hugh David Pernell;

then you shall find the defendant, Marlon Latodd Howell, guilty of capital murder in the death of Hugh David Pernell as charged under the indictment.

If the State of Mississippi has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant, Marlon Latodd Howell, not guilty of capital murder in the death of Hugh David Pernell as charged under the indictment.

FILED THIS THE 23rd DAY
OF March 2001
BILLY STANFORD
CIRCUIT CLERK
Helen Randle D.C.

Given

IN THE CIRCUIT COURT
OF UNION COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs. **Criminal Case No. UK2000-82**

MARLON LATODD HOWELL

JURY INSTRUCTION NUMBER S-2

(Definition and Elements of Robbery)

THE COURT instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that:

(1) The defendant, Marlon Latodd Howell, did, on or about the 15th day of May, 2000, unlawfully, willfully and feloniously, attempt to take the personal property of Hugh David Pernell; and,

(2) The defendant, Marlon Latodd Howell, attempted to take the personal property from the person of Hugh David Pernell and against the will of the said Hugh David Pernell; and,

(3) The defendant, Marlin [sic] Latodd Howell, attempted to take the property by violence toward Hugh David Pernell by shooting the said Hugh David Pernell with a pistol; and,

(4) at the time, Marlon Latodd Howell had the intent to permanently deprive Hugh David Pernell of the property,

then you shall find that the defendant, Marlon Latodd Howell, was engaged in the commission of the crime of robbery as contemplated by Jury Instruction Number S-1.

If the State of Mississippi has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find that the defendant, Marlon Latodd Howell, was not engaged in the commission of the crime of robbery as contemplated by Jury Instruction Number S-1.

FILED THIS THE 23rd DAY
OF March 2001
BILLY STANFORD
CIRCUIT CLERK

Given

Helen Randle D.C.